

STATE OF MINNESOTA

BUREAU OF MEDIATION SERVICES

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

CITY OF NEWPORT, MINNESOTA,

EMPLOYER

and

ARBITRATOR'S AWARD
BMS Case No. 15PA0483
DISCIPLINARY ACTION

LAW ENFORCEMENT LABOR SERVICES,

UNION

ARBITRATOR

John J. O'Donnell

DATE ARBITRATOR NOTIFIED OF SELECTION

January 15, 2015

DATE OF HEARING

August 20, 2015

DATE OF POST HEARING BRIEFS

October 19, 2015

DATE OF AWARD

November 9, 2015

ADVOCATES

FOR THE EMPLOYER

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FOR THE UNION

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ISSUE

Did the City of Newport violate the Collective Bargaining Agreement by imposing a ten (10) day suspension without pay upon Officer Joel Muellner (Grievant) without just cause?

WITNESSES

Deb Hill, Newport City Administrator
Curtis Montgomery, Newport Chief of Police
Joel Muellner, Police Officer, City of Newport

JURISDICTION

The City of Newport, Minnesota (City) and Law Enforcement Labor Services, Inc. (Union) have negotiated a collective bargaining agreement (CBA) effective January 1, 2015 through December 31, 2017 (Joint Exhibit 1).

The CBA contains a grievance procedure, Article XII, which sets out procedures for filing grievances and submission of grievances to final and binding arbitration. The Parties stipulate that all requirements have been met and the matter is properly before the Arbitrator.

The parties selected John J. O'Donnell to arbitrate and resolve the matter in dispute.

Arbitration of this matter is conducted according to the provisions of the Minnesota Public Employment Labor Relations Act, as amended, Minn. Stat. 179A.01 – 179A.30 (PELRA) and the CBA.

A hearing on this matter was conducted on August 20, 2015 in the offices of the Union in the City of St. Paul, Minnesota. The parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter. Witnesses testified under oath or affirmation and were subject to direct and cross examination. A verbatim record was not made of the hearing. All exhibits offered were received without objection except for the continuing objection to the receipt of the videotape evidence more fully discussed below. The Parties agreed to submit post-hearing briefs on October 12, 2015. The Parties requested to extend the time to submit post-hearing briefs to October 19, 2015. Post-hearing briefs from the parties were received electronically by the Arbitrator on October 19, 2015. The record was closed on October 19, 2015 and this Award follows.

RELEVANT CONTRACT PROVISIONS

Relevant provisions of the CBA are as follows:

ARTICLE II. EMPLOYER AUTHORITY

2.2 Hire, promote, transfer, assign, retain employees in positions and to suspend, demote, discharge or take disciplinary action against employees.

ARTICLE XI. DISCIPLINE

11.1 The City will discipline employees for just cause only. Discipline will be in the form of:

- A. Oral reprimand
- B. Written reprimand
- C. Suspension
- D. Demotion, or
- E. Discharge.

ARTICLE XII. GRIEVANCE PROCEDURE

12.6 Arbitration Procedure: In the event that the employee and the City Council are unable to adjust any grievance as defined in Section 12.1 herein, the grievance may be submitted to binding arbitration.

D. Decisions by the Arbitrator in cases properly him shall be final and binding upon the parties.

F. The Arbitrator shall have jurisdiction over disputes or disagreements relating to matters properly before the Arbitrator shall not extend to the proposed changes in terms and conditions of employment as defined herein and contained in a written agreement or memorandum of agreement as agreed to by the parties; nor shall an Arbitrator have jurisdiction over any matter which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein; nor shall the jurisdiction of the Arbitrator extend to matters of inherent managerial policy, which shall include but are not limited to such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

ARTICLE XVII. SAVINGS CLAUSE

The Agreement is subject to the laws of the United States, the State of Minnesota, and Washington County. In the event any provision of this Agreement shall be held to be contrary to law by a court of competent jurisdiction from whose final judgment or decree no appeal has been taken within the time provided, such provisions shall be voided. All other provisions shall

continue in full force and effect. The voided provision may be re-negotiated at the request of either party.

EXHIBITS RECIEVED

Exhibits were offered in a binder entitled “Union Exhibit List For Arbitration” prepared by the Union. The City offered a videotape of images captured by a surveillance cameras installed in the Public Works Director's office and the City Administrator's office. No additional exhibits were offered by the City. Without objection the binder of exhibits was received into evidence subject to a continuing objection by the Union of receipt of videotape evidence. The following materials are included in the exhibit binder behind tabs.

Tab 1 – Collective Bargaining Agreement between the Parties for the period January 1, 2015 through December 31, 2017.

Tab 2 – Copy of Minnesota Statute 626A.02 (2014) (Statute).

Tab 3 – Copies of a report of an investigation prepared by Capt. Jim Rogers of the Dakota County Sheriff's Department (Rogers), August 14, 2014. Included in Roger's report are copies of a memo from Curt Montgomery, Newport Chief of Police (Montgomery) to Grievant entitled “Summary of Accusations;” memo from Montgomery entitled “Order to Cooperate with Internal Affairs Investigation, July 29, 2014; Garrity/Tennessen Warning acknowledged by Grievant, July 29, 2014; list of dates and times Grievant appears on both videotapes; transcript of Voluntary Statement of Grievant to Rogers, 17 pages, indicating presence of Scott Higbee, identified as an Attorney for Grievant, July 29, 2015; transcript of conversations between a custodial employee of the City (J.S.) and Grievant on videotape from the surveillance camera in Hill's office.

Tab 4 – Copy of letter from Hill to Grievant informing Grievant of his suspension. The specific grounds for discipline are stated as violations of Newport Police Department Policies, Canons of Police Ethics, Article 6 Private Conduct, Section 120 Insubordination and Section 122 Dereliction of Duty

which consisted of the following:

Through an investigation by Dakota County, evidence was produced that clearly shows that on June 1, 2014, you assisted or were observed cooperating with another employee who opened the city administrator's locked office and removed from that desktop, papers or information for which he had no authorization to receive or take. You were also observed to be in an office of a manager of the City of Newport without authorization on April 18, 2014, April 24, 2014, and April 24, 2014.

At the hearing, Hill testified that the first date of April 24 should have read "April 23, 2014."

Tab 5 – Copies of correspondence from Dennis Kiesow, LELS Business Agent (Kiesow) notifying Hill of Step 2 of the Grievance Procedure; e-mails between Kiesow and Fritz Knaak, Attorney for City; letter from Hill to Kiesow denying grievance at Step 2; letter from Kiesow to City Council as Step 3 of the Grievance Procedure; letter from Hill to Kiesow denying grievance at Step 3; letter from Kiesow to Hill as notice of appeal of the grievance to arbitration; letter of Kiesow to Bureau of Mediation Services requesting panel of arbitrators; letter of Isaac Kaufman, Counsel for LELS to John J. O'Donnell notifying of selection as Arbitrator.

BACKGROUND

The City of Newport, Minnesota, provides traditional city government services including law enforcement. Grievant in this matter has been employed by the City as a Police Officer for approximately sixteen and one-half (16 ½) years at the time of the hearing. Grievant is properly licensed and qualified for his position.

The Union is the exclusive representative of the bargaining unit that includes police patrol officers.

The City maintains offices in the City Hall for its administrative functions which includes the

offices of the Police Department. Hill is employed as City Administrator by the City and her office is also in the City Hall. Among other things, Hill's duties include general supervision of all City functions and departments including the Police Department. Hill's authority extends to reviewing and granting or denying grievances submitted pursuant to the Grievance Procedure.

Videotape recordings from two surveillance cameras are at issue in this matter. The first camera was installed at the office of Bruce Hansen (Hansen), the City's Public Works Director, in response to a suspected theft of money from his office which occurred after regular office hours. This camera recorded activity in Hansen's office in which Grievant is alleged to have entered on April 18, 23 and 24, 2014.

The second camera was installed in Hill's office in response to her suspicion that some person had entered her office outside of regular office hours when her office was locked. Hill's suspicion was based upon her observation that objects and files on top of her desk had been moved. To verify her suspicion, Hill took a photo of her desk top. She compared the photo with the arrangement of things on her desk the following day. The comparison indicated that some things on her desk had been moved. Nothing had been removed from Hill's office.

Hill contacted Rogers to conduct an internal investigation of five police officers. Rogers' investigation included review of videotapes from both cameras and personal interviews with Hansen, J.S., and the Grievant. Rogers prepared a report of his investigation including conclusions and gave it to Hill who issued a written notice of suspension without pay for ten (10) days to Grievant.

The videotape from Hansen's office contain images of police officers in Hansen's office. Grievant does not admit the images are of him. Grievant did admit to Rogers that he went into Hansen's office occasionally to look out windows at turkeys in a woods and denies looking at anything on Hansen's desk. Grievant also told Rogers that Hansen's office was never locked.

The second videotape includes images of the Grievant and J.S. in Hill's office on June 1, 2014 after regular office hours and when Hill's office would have been locked.

POSITIONS OF THE PARTIES

CITY

The City argues that it has authority to suspend an employee pursuant to Article II, Section 2.2 and such authority is limited only by the requirement of Article XI, Section 11.1 that suspension may be only for just cause.

The City argues that its burden is to show that a clearly established rule or norm exists and that the employee violated the rule or norm.

The City argues that there is no disagreement that Grievant entered Hill's office; that it was wrongful; that its policies were violated; and that Grievant admitted to Rogers that his actions were wrongful and violated at least the department policy relating to dereliction of duty.

The City argues that Grievant's presence in accompanying another City employee in entering a locked office without permission and failure to direct the other employee to leave constituted a violation of the Department's policy on dereliction of duty. The City further argues that Grievant's conduct constituted disrespect for and undermining Hill's authority as Grievant's supervisor which is in violation of the Department's policy against insubordination.

The City argues that failure to discipline Grievant for his conduct will encourage ongoing disrespect to Hill and her position to the detriment of her ability to manage employees.

The City argues that Grievant's actions ordinarily would constitute grounds for discharge. However, Hill testified that Grievant's admission of wrongdoing and expression of remorse was considered in her decision to impose the lesser penalty of suspension without pay.

The City argues that evidence obtained from concealed surveillance cameras is not excludable for the following reasons.

1. An arbitrator's authority derives from the CBA and does not normally extend to interpretation of statutory law.
2. Nothing contained in the Statute provides for exclusion of evidence obtained from concealed surveillance cameras in an arbitration proceeding.
3. The Statute provides civil and criminal remedies for its violation and an arbitrator has no authority to impose such remedies.
4. Provisions relating to employer use of concealed surveillance methods apply only where the employee has a reasonable expectation of privacy and are limited to actual communications and not to the images themselves.
5. An employee has no more reasonable expectation of privacy in entering a locked supervisor's office than a burglar entering a private residence.
6. The City's case does not change even if videotape evidence is excluded because Grievant admitted that he improperly entered Hansen's and Hill's offices and that such conduct violated City policies. The City cites Minnesota State Patrol Troopers Association on Behalf of Pince v. State Department of Public Safety, 437 N.W.2d 670 (Minn.App. 1989) (Troopers) for the proposition that even though evidence may be improperly obtained an arbitrator in a discharge proceeding may admit such evidence under the arbitrator's broad authority to determine admissibility of evidence.

Finally, the City argues that posting a sign on the front door of City Hall after the surveillance occurred that the premises may be under surveillance is merely a remedial measure and cannot be taken as an admission of wrongdoing.

The City requests the Arbitrator uphold the discipline of Grievant imposed by the City.

UNION

Grievant has been employed as a Police Officer for the City for 16½ years and has received no discipline above the level of a reprimand. Grievant does not participate directly in collective bargaining activities with the City.

Hill had a motion-activated surveillance camera set up in her office without involvement of the Newport Police Department or any other law enforcement agency.

The City installed a sign on the front door of City Hall that reads “These premises may be under surveillance” after the events involved in this matter.

On June 1, 2014, Grievant was on duty at City Hall; while talking with J.S., J.S. unlocked the door to Hill's office and entered; and Grievant followed J.S. into the office. The surveillance video shows Grievant and J.S. were in Hill's office for approximately 2 and one half minutes; Grievant made several comments that were meant as jokes and laughter followed the comments; Grievant testified at the hearing that he did not look closely at any files on Hill's desk, did not recall what any of the files were, and did not touch or remove any files.

Roger's investigation report includes the video from Hill's camera as well as interviews with J.S. and Grievant; J.S. admitted to Rogers he made a mistake looking through files on Hill's desk; J.S. stated the idea to look at the files was his idea alone and he had not acted under Grievant's direction.

J.S. resigned his position with the City in lieu of discharge.

The City's primary evidence the Grievant acted improperly lies in images from the surveillance camera installed in Hill's office. Without the images from the surveillance camera there was no way the City would have learned that Grievant had been in Hill's office.

The images and conversation obtained from the surveillance camera was obtained in violation of the Statute.

By recording the conversation between Grievant and J.S and using that recording as a basis for Grievant's suspension the City violated the Statute. The Union further argues that exceptions in the

Statute for recording one's own conversation or that one party to a conversation may consent to recording without the other party's knowledge are not applicable because Grievant did not make the recording and neither party to the conversation consented to its making.

In sum, the Union argues that since the images and conversations obtained by the surveillance camera were obtained unlawfully everything that follows: identification of Grievant in Hill's office, Rogers' interview of Grievant and his admissions therein, and Grievant's admissions in testimony at the hearing, are the “fruit of the poisonous tree” and cannot be admitted as evidence in this proceeding.

The Union argues that by posting the warning sign on the front door of City Hall the City conceded that it is required to provide notice of possible surveillance before using surveillance cameras in order to avoid culpability under the Statute. The Union further argues that the City's response that the warning sign is a remedial measure is a doctrine of tort law and not applicable in this proceeding, citing Minnesota Rules of Evidence 407.

The Union notes that there is no Minnesota case law addressing the Statute in the context of employment arbitration. The Union argues, however, that the CBA at Article XVII contains a saving clause which makes the CBA subject to the laws of the United States and the State of Minnesota.

The Union argues that a leading treatise on labor arbitration claims that an employer must have a reasonable basis to believe that an employee was engaging in misconduct before it may conduct videotape surveillance of the employee. The Union cites a labor arbitration decision that sustained a grievance that a school district had conducted surveillance of employees through cameras installed on school buses where the school failed to provide a reason for the surveillance. The Union also cited arbitration decisions that installing surveillance cameras without bargaining with the union was improper; a transcription of a conversation would be excluded where the party against whom it was offered was unaware of the recording. The Union also cited federal court decisions that held that warrantless videotaping of public employees may, depending on the circumstances, be a violation of

the employee's Fourth Amendment right against unreasonable searches; and cases where videotaping may constitute an invasion of an employee's privacy.

The Union argues that Hill's decision of what level of discipline to impose on Grievant is a conflict of interest since she is also the alleged victim of his conduct citing an arbitration decision that the employer must assess evidence against an employee fairly and objectively.

The Union argues that another Newport police officer who was videotaped in Hansen's office having a sexual liaison while on duty received a two-day suspension. Grievant's ten-day suspension is disproportionate and unfair.

Finally, the Union argues that when the City "leapfrogged" from prior discipline of written reprimand to a ten-day suspension, the City violated long held principles of progressive discipline which aim at correcting unacceptable behavior of an employee when an employee is amenable to rehabilitation and that employees with long and satisfactory service deserve some additional consideration.

The Union requests that the Arbitrator grant the grievance in its entirety and strike the ten-day suspension and, in the alternative, if the grievance is denied, the penalty should be reduced.

DISCUSSION

Although as a general rule arbitrators will avoid interpretation of laws and statutes whenever possible, the Union raises a threshold question that must be answered that involves the applicability of the Statute. If the Union's argument that all evidence contained in the videotape in Hill's office as well as all evidence that was obtained as a result of identifying Grievant through the surveillance camera must be excluded because the videotape was produced in violation of the Statute all evidence against the Grievant disappears and the Grievance must be granted. Therefore, a determination must be made whether to exclude all evidence originating or following from the videotape in Hill's office.

As a first step, the CBA does not prohibit or regulate use of surveillance cameras in the

workplace. As a second step it should be noted that the Statute operates as an exclusionary rule of evidence.

It is possible to decide whether the surveillance evidence in this case must be excluded without interpreting the Statute by examining the Minnesota Court of Appeals decision in *Troopers*. In a pre-arbitration motion, the trooper claimed a search warrant was not based upon sufficient probable cause. The arbitrator denied the motion to exclude evidence gathered in a search of the trooper's home and the parties proceeded to a hearing to determine whether the Patrol had just cause to discharge the trooper. The arbitrator found that the evidence supported the trooper's discharge. The district court denied a motion to vacate the award, holding that the evidence was properly admitted pursuant to a legitimate search warrant, but further determined that the exclusionary rule did not apply in labor arbitration which is a civil action. The Minnesota Court of Appeals specifically limited the application of the exclusionary rule to labor arbitration proceedings involving the possible loss of a job. *Troopers*, 676. Because this matter does not involve possible loss of a job the exclusionary rule does not apply.

It is also not necessary for this Arbitrator to consider whether posting the sign warning of surveillance is an admission the Statute applies and whether the Savings Clause brings the Statute into the CBA.

Discussion then moves to whether sufficient admissible evidence is presented to justify Grievant's suspension.

The Union draws attention to a labor arbitration decision that an arbitrator sustained a grievance where the school district installed surveillance cameras on school buses and where the school failed to provide a reason for the surveillance. In this case Hill stated the theft of money from a different office and evidence that her locked office had been entered after hours was the reason for installing the camera in her office.

Grievant admitted to Rogers that he was in Hill's office once; that J.S. opened the locked door to

Hill's office; that he is aware of Departmental policies; that he was aware one of the files related to police contract negotiations; that he probably should not have gone into Hill's office; that he should have told J.S. to leave the office; that he was not sure his conduct violated the insubordination policy, but probably violated the dereliction of duty policy because he did not tell J.S. this was the wrong thing to do.

The Union also argued that a line of cases hold that warrantless videotaping of public employees in the workplace may violate employees' Fourth Amendment rights against unreasonable searches. However, this issue is settled in Minnesota. *Troopers* extends the exclusionary rule to public employee labor arbitration cases, but only where the loss of a job is involved. Additional argument that the surveillance camera may violate the employee's privacy rights also do not apply. Cases that apply the privacy standard are limited to situations where the employee had a reasonable expectation of privacy such as in a bathroom stall or a locker room. Here, there can be no expectation of privacy where an employee enters a locked office after business hours where confidential information is kept.

The Union also argues that Hill has an inherent conflict of interest in her role as victim of the intrusion and the person deciding the discipline. Newport is a small city and the City Administrator is charged with making decisions regarding discipline. Hill asked a different law enforcement agency she has no authority over to conduct an independent investigation. Hill's decision to discipline Grievant was made after the independent investigation. Under these circumstances no conflict of interest occurred.

As for the Union's argument that arbitration decisions require employers to assess evidence against an employee fairly and objectively, Hill did not assess evidence against Grievant, but acted on Rogers' determination that Grievant "did violate Newport Police Department policies ... when he entered Ms. Hill's office with [J.S.] and looked through private files on her desk" (Rogers' Report, Tab 3, p.5). No claim is made that Rogers' did not assess the evidence against Grievant fairly and

objectively.

The Union argues that suspending Grievant for ten days is disproportionate when another police officer who had a sexual liaison in Hansen's office was suspended for two days and that Hill “leapfrogged” in Grievant's case from written reprimand to a ten-day suspension. However, Hill testified that she originally proposed to suspend the other officer for five days, but reduced the suspension to two days after negotiation and because the officer had no prior disciplinary incidents. Hill knew that Grievant had received three prior written reprimands, the latest being in 2014.

Montgomery testified that Grievant had been given written reprimands as discipline in 2005 for failure to follow an order; in 2008 for failure to follow a proper procedure relating to bill payment; and in 2014 for failure to provide a citizen his name and badge number.

A City ordinance gives the City Administrator the final authority to decide discipline of employees. As a general rule, the decision of what level of discipline to apply belongs to the person making the decision and will not be second-guessed by arbitrator.

Finally, the Union argues that the ten-day suspension is excessive and if the grievance is denied the penalty should be reduced.

CONCLUSIONS

The exclusionary rule announced in *Troopers* applies to labor arbitration proceedings that involve possible loss of a job which is not the case here. *Troopers* supports the long standing axiom that labor arbitrators have broad authority to determine the admissibility of evidence and that statement freely and voluntarily given, without any compelling influences, are admissible. There is sufficient admissible evidence to support Grievant's suspension.

The reasons stated by Hill for installing the cameras are sufficient reasons.

Grievant's statements to Rogers were given after he was notified that an interview would be taken. Grievant had time to prepare for the interview and had union representation during the interview.

There is no evidence that Grievant's statements were made under compelling circumstances.

Grievant admitted to Rogers that he was in Hill's office; that he knew he probably was violating city policies; and that he took no action to stop the custodial from entering Hill's office or tell him to get out. In addition, Grievant testified at the hearing that he entered Hill's office with J.S. and that his statement to Rogers that he was aware of the policies at issue and that he violated or probably violated those policies was not inaccurate.

AWARD

The evidence supporting the charges against the Grievant is clear and convincing.

In accordance with the evidence and testimony, the terms and conditions of the CBA, Newport policies and Minnesota Statutes, there is just cause for the proposed discipline of the Grievant.

Based on the foregoing, **the grievance is DENIED. However, Grievant's suspension is reduced to five (5) days.**

November 9, 2015

John J. O'Donnell, Arbitrator

The parties are commended on the professional and thorough manner with which they presented their cases. It has been a pleasure to be of assistance in resolving this matter.